

BEFORE LINDA MCCULLOCH, STATE SUPERINTENDENT  
OF PUBLIC INSTRUCTION  
STATE OF MONTANA

MICHAEL MICHUNOVICH,

OSPI 291-02

Appellant,

v.

YELLOWSTONE COUNTY SCHOOL  
DISTRICT NO. 7-70, LAUREL,  
MONTANA, By And Through Its  
Board Of Trustees,

Respondent.

**FINAL ORDER**

This matter came before Linda McCullough, the Superintendent of Public Instruction (State Superintendent), as an appeal of a controversy decided by a county superintendent pursuant to Mont. Code Ann. § 20-3-107. The Superintendent of Public Instruction disqualified herself from presiding over this matter by order dated November 19, 2002, and the undersigned Hearing Examiner was appointed to render a final decision pursuant to Mont. Code Ann. § 20-107(4). Undersigned Hearing Examiner therefore issues this final order as the acting State Superintendent pursuant to those statutory provisions. She will be referenced hereafter as the "State Superintendent."

1 BACKGROUND

2 I. PROCEDURAL BACKGROUND.

3 On March 23, 2001, Petitioner Michael Michunovich  
4 appealed to the Yellowstone County Superintendent of Schools  
5 regarding issues surrounding the decision by the Board of  
6 Trustees of Respondent Laurel School District 7 and 7-70 to  
7 transfer Petitioner from the position he held as Principal of  
8 Laurel High School to the position of Support Services  
9 Director for the 2001-02 school year.

10 The procedural history of the proceedings before the  
11 County Superintendent, including a previous appeal before the  
12 State Superintendent which resulted in a remand to the County  
13 Superintendent, and including appointment of a hearing  
14 examiner to sit in place of the Yellowstone County  
15 Superintendent, are set out in full in the Findings of Fact,  
16 Conclusions of Law and Order issued by Hearing Examiner  
17 Rachel Vielleux on March 28, 2002, as well as in her order of  
18 August 22, 2002. Hearing Examiner Vielleux is the Missoula  
19 County Superintendent of Schools and will be referenced  
20 hereafter as the "County Superintendent."

21 After issuing the August 22, 2002, order, further  
22 proceedings were held before the Board of Trustees pursuant  
23 to that order. By order dated September 18, 2002, the County  
24 Superintendent clarified that by its very nature, the order  
25 of August 22, 2002, was interlocutory in nature, since it  
26 ordered the Board of Trustees to undertake particular actions  
27

1 and then report back to her. On September 26, 2002, the  
2 County Superintendent issued her Final Order.

3 Petitioner filed a detailed 10-page notice of appeal of  
4 a portion of the County Superintendent's orders of August 22,  
5 2002, and the final order of September 26, 2002. The parties  
6 briefed the issues on appeal and oral argument was held on  
7 May 16, 2003.

8 **II. COUNTY SUPERINTENDENT'S FINDINGS OF FACT.**

9 **A. March 28, 2002, Order.**

10 Upon remand from the State Superintendent's initial  
11 consideration of this matter, the County Superintendent set a  
12 briefing schedule for the parties to submit facts and  
13 arguments on the issue of whether Petitioner had a contested  
14 case and whether the County Superintendent had jurisdiction.  
15 The County Superintendent issued findings of fact,  
16 conclusions of law and an order on those issues on March 28,  
17 2002. The State Superintendent adopts verbatim the findings  
18 of fact made by the County Superintendent on March 28, 2002.  
19 The following findings of fact which were made in that order  
20 are pertinent to issues presented in the instant appeal:

21 . . . . .

22 11. Michunovich has been continuously employed by  
23 the Board for twenty-four years. During the last  
24 fourteen years, Michunovich has been employed by  
the Board as the High School Principal.

25 12. As late as the spring of 2000, District  
26 Superintendent McMilin stated that Petitioner's job  
27 performance was acceptable overall. Prior  
evaluations by McMilin from 1996-97 had been  
positive.

1 . . . . .

2 16. In a memo dated February 19, 2001,  
3 Superintendent McMilin notified Michunovich that  
4 pursuant to District Policy 6130, McMilin would  
5 recommend to the Board that Petitioner be  
6 reassigned to the District's Support Services  
7 Director position effective school year 2001-02.

8 The County Superintendent concluded that Petitioner did have  
9 a contested case that was timely filed. Those findings and  
10 conclusions have not been appealed by the Board of Trustees.

11 The County Superintendent also made the following conclusions  
12 of law pertinent to issues on appeal:

13 1. MCA 20-4-203(1) regarding the definition of  
14 teacher tenure states in pertinent part as follows:

15 . . . the teacher is considered to be  
16 reelected from year to year as a tenured  
17 teacher at the same salary and in the same or  
18 a comparable position of employment as that  
19 provided by the last-executed contract with  
20 the teacher unless the trustees resolve by  
21 majority vote of their membership to terminate  
22 the services of the teacher in accordance with  
23 the provisions of 20-4-204.

24 2. In Sorlie v. School District No. 2, 2 Ed. Law  
25 148-49, the Montana Supreme Court stated the  
26 following:

27 There is no separate tenure for administrative  
personnel . . . We conclude that tenure acquired  
as a teacher applies to a subsequent  
administrative position. Section 20-1-101(2)  
MCA, clearly provides that a teacher and  
administrator are comparable positions *for*  
*purposes of acquiring tenure*. If this were  
not so, an educator could lose tenure rights  
by accepting a promotion to an administrative  
position. [Emphasis added by County  
Superintendent.]

1           **B.     August 22, 2002, Order.**

2           Hearing was held before the County Superintendent on  
3 June 17 and 18, 2002. Findings of fact, conclusions of law  
4 and an order were then issued on August 22, 2002. The State  
5 Superintendent adopts those findings of fact verbatim. The  
6 following findings of fact which were made in that order are  
7 pertinent to and dispositive of issues presented in the  
8 instant appeal:

9           1.     Petitioner was hired by the Laurel School  
10           District in 1975 to teach math and science. In  
11           1985 he was hired as the assistant principal at the  
12           middle school and as the district technology  
            person. In 1987, he was hired as the Laurel High  
            School Principal.

13           . . . . .

14           7.     From 1997 to 2001, Petitioner received the  
15           rating of "Effective" on all categories of his  
16           Administrative Performance Appraisal Instruments as  
            written by Superintendent McMilin. The ratings  
            available were "Exemplary, Effective, Needs  
            Improvement, and Unsatisfactory."

17           8.     Superintendent McMilin gave Petitioner an  
18           overall rating of "7" in school years 1999-2000 and  
19           2000-01 on his Administrative Performance Pay  
            Report, a rating sufficient to warrant performance  
            pay.

20           9.     The Board of Trustees voted to authorize an  
21           increase in Petitioner's salary as a result of his  
            performance pay rating.

22           10.    Petitioner stated during his testimony that  
23           Superintendent McMilin had not presented him with a  
24           plan of improvement. Superintendent had not told  
            him of deficiencies that would lead to his removal  
            as high school principal.

25           . . . . .

26           20.    In a memo dated February 19, 2001,  
27           Superintendent McMilin notified Petitioner that, in  
            accordance with Policy 6130, he would be

1 recommending the Trustees reassign him to the  
2 position of Support Services Director at the  
3 February 26 meeting. The memo contains negative  
4 information about Petitioner that was not part of  
5 any of Petitioner's evaluations.

6 . . . . .

7 23. In regards to Petitioner's new position as  
8 Support Services Director, Superintendent McMilin  
9 testified that ". . . there wasn't a job  
10 description, basically there wasn't a finished job  
11 description; it was a job in evolution." He  
12 further went on to say, "If, in fact, for  
13 comparability--and I'll say it, if for  
14 comparability you have to have a job description in  
15 place, ready to go, complete, we didn't do it,  
16 because that isn't the way we reorganized.  
17 Everybody had a general understanding of what  
18 support services meant, and eventually there would  
19 be things added on."

20 24. From 1998 until January of 2002, Bruce  
21 Robertson held the position of Director of Support  
22 Services for Laurel School District. When asked if  
23 that position was comparable to that of High School  
24 Principal, he replied, "Absolutely not."

25 25. When asked by [counsel for the Board of  
26 Trustees] about the comparability of positions of  
27 high school principal and support services  
28 director, Superintendent McMilin replied, "I don't  
29 think that -- my comment on it is, I don't think  
30 that's [Bruce Robertson's] call to make. I don't  
31 think he understood fully what it was evolving  
32 into, and so, but he's entitled to his opinion.  
33 But you have got to remember that his job, this job  
34 *it's in my vision*, not -- and what subsequently  
35 gets transpired or transferred to a job  
36 description." [Emphasis added by County  
37 Superintendent.]

38 26. Petitioner held both the position of high  
39 school principal and the position of director of  
40 support services. In extensive testimony, he  
41 compared the duties and responsibilities of the two  
42 positions. His testimony was that they are  
43 significantly and substantially different  
44 positions.

45 . . . . .

1       31. The reassignment of Michunovich was in no way  
2 related to the financial condition of the district.

3       Other findings pertaining to a motive for the transfer  
4 of Petitioner that may have been impermissible or pertaining  
5 to alleged improper procedures followed by the Board of  
6 Trustees are not relevant to a decision in the instant case.

7       The County Superintendent also made a number of  
8 pertinent conclusions of law in the order of August 22, 2002.  
9 They included conclusions that:

- 10       • The County Superintendent had jurisdiction to  
11       hear and decide the case. (Concl. of Law No.  
12       1.)
- 13       • The holding in Sorlie v. School District, 205  
14       Mont. 22, 667 P.2d 400 (1983), allowing  
15       reassignments without reduction in salary  
16       where legitimate financial constraints exist  
17       was not applicable to the instant case because  
18       the reassignment was not for financial reasons  
19       and, in fact, would add to the District's  
20       personnel costs. (Concl. of Law Nos. 2-5.)
- 21       • The definition of "teacher" in Mont. Code Ann.  
22       § 20-1-101(18) includes all certified  
23       personnel except district superintendents and  
24       Petitioner is therefore a "teacher" by  
25       definition. (Concl. of Law No. 6.)
- 26       • Mont. Code Ann. § 20-4-203, which requires  
27       that a tenured teacher be reelected from year  
28       to year at the same salary and in the same or  
29       a comparable position, applied to Petitioner  
30       as an administrator. (Concl. of Law No. 7.)

31       The County Superintendent also made the following  
32 Conclusions of Law pertinent to this matter:

33       8. Even if the Respondent Trustees thought  
34 Petitioner had tenure as a high school principal  
35 which it is likely they did not, they could not  
36 possibly have determined the comparability of the  
37 position of high school principal to that of

1 support services director. The current support  
2 services director's testimony said they were not  
3 comparable, but there was no written job  
4 description to verify that. Superintendent McMilin  
5 stated that the job was evolving according to his  
6 vision which further reinforces the fact that the  
7 trustees could not determine comparability.

8 9. As a matter of law, the position of Director  
9 of Support Services now held by Petitioner as it is  
10 currently defined is not comparable to the position  
11 of High School Principal.

12 The County Superintendent concluded in Conclusions of  
13 Law Nos. 8 and 9 that the Board of Trustees transferred a  
14 tenured high school principal to a position that was not  
15 comparable to the position of high school principal. That  
16 determination is spelled out in the County Superintendent's  
17 order, which states:

18 Within 30 days of receipt of this Order, Respondent  
19 Trustees will assign Petitioner Michunovich to a  
20 position comparable to that of high school  
21 principal.

22 The order then goes on to require the Board of Trustees  
23 to provide an analysis of the new position in writing to the  
24 County Superintendent on or before September 23, 2003,  
25 comparing it to the position of high school principal. It  
26 sets out a list of factors that the Trustees are to consider  
27 in analyzing comparability. The order also provided that the  
County Superintendent would retain jurisdiction over the  
proceedings until she received and evaluated the information  
about comparability of the position to which the Board of  
Trustees would assign Petitioner.



1           C.     September 26, 2002, Order.

2           In the September 26, 2002, order, the County  
3 Superintendent made the following three findings of fact:

4           1.     On September 16, 2002, Respondent Board of  
5 Trustees held a special board meeting to consider  
6 the administrative job description for Petitioner

7 Michael Michunovich. Respondent provided the  
8 [County Superintendent] with a transcript of the  
9 proceedings.

10          2.     Pursuant to the Order issued August 22, 2002,  
11 Superintendent Singleton provided Respondent with a  
12 line-by-line analysis of the comparability of the  
13 newly defined position of District Director of  
14 Support Services to that of High School Principal.

15          3.     Respondent reassigned Petitioner to the new  
16 position of District Director of Support Services.

17           The State Superintendent adopts those findings of fact.

18                                 DISCUSSION

19           Montana Code Annotated § 20-4-203(1) provides that:

20           **20-4-203. Teacher tenure.** (1) Except as provided  
21 in 20-4-208, whenever a teacher has been elected by  
22 the offer and acceptance of a contract for the  
23 fourth consecutive year of employment by a district  
24 in a position requiring teacher certification  
25 except as a district superintendent or specialist,  
26 the teacher is considered to be reelected from year  
27 to year as a tenured teacher at the same salary **and**  
**in the same or a comparable position of employment**  
as that provided by the last-executed contract with  
the teacher unless the trustees resolve by majority  
vote of their membership to terminate the services  
of the teacher in accordance with the provisions of  
20-4-204. (Emphasis added.)

28           Here, there is no claim made by Petitioner that his  
29 salary or benefits were lowered when the Board of Trustees  
30 transferred him from the principal's position to the Special  
31 Services Director position. There is also no contention that

1 the transfer of Petitioner to the position of Special  
2 Services Director occurred as a result of a termination in  
3 accordance with the provisions of Mont. Code Ann. §§ 20-4-204  
4 and 20-4-207.

5 The controversy before the State Superintendent in the  
6 instant appeal is limited to the issues of whether Petitioner  
7 was placed in a comparable position of employment, whether he  
8 was afforded due process, and what remedy, if any is  
9 appropriate. Petitioner's contention that the transfer  
10 constituted a termination from his position will also be  
11 addressed.

12 **A. Comparability of the Positions.**

13 It is undisputed here that under the statutory provision  
14 cited above, district board of trustees may reassign a  
15 tenured teacher or principal for no particular reason, as  
16 long as the teacher or principal receives the same salary and  
17 as long as the position to which the teacher or principal is  
18 transferred is comparable to the position previously held.<sup>1</sup>  
19 Evidence introduced by Petitioner regarding the district  
20 superintendent's communications with the Respondent Board of  
21

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22 1. Certainly, the State Superintendent recognizes that  
23 a district may be restricted in some instances from  
24 transferring a teacher or administrator to a different  
25 position. For example, if such transfer occurred in violation  
26 of public policy as retaliation for the individual's exercise  
27 of a constitutional or statutory right--such as whistle  
blowing or speaking out on constitutional matters which were  
the current subject of public discourse that he, as any  
member of the public, had a right to comment upon at that  
time--that could present different issues. No such  
allegations are relied upon by the Petitioner in the instant  
appeal, however.

1 Trustees--and whether those communications addressing the  
2 local Superintendent's concerns over the conflict between  
3 their respective management styles could properly be  
4 considered as a basis for disciplinary action--is therefore  
5 irrelevant.

6 Management has the prerogative to shift employees and  
7 work assignments in the interests of maintaining efficiency  
8 in its operations. As the Supreme Court recognized in Arnett  
9 v. Kennedy, 416 U.S. 134 (1974):

10 [T]he Government's interest, and hence the public's  
11 interest, is the maintenance of employee efficiency  
12 and discipline. Such factors are essential if the  
13 Government is to perform its responsibilities  
14 effectively and economically. To this end, the  
15 Government, as an employer, must have wide  
16 discretion and control over the management of its  
17 personnel and internal affairs. This includes the  
18 prerogative to remove employees whose conduct  
19 hinders efficient operation and to do so with  
20 dispatch. Prolonged retention of a disruptive or  
21 otherwise unsatisfactory employee can adversely  
22 affect discipline and morale in the work place,  
23 foster disharmony, and ultimately impair the  
24 efficiency of an office or agency.

25 416 U.S. at 168. However, the caveat in making a transfer of  
26 a tenured employee who has a due process property interest in  
27 the employment position is that it must be handled pursuant  
28 to the safeguard set out in Mont. Code Ann. § 20-4-203(1):  
29 Unless action is taken based upon good cause, per Mont. Code  
30 Ann. § 20-4-207, the tenured employee must be afforded a  
31 lateral transfer to a comparable position.

32 Here, the County Superintendent rejected the Board of  
33 Trustees' contention that the Petitioner had been transferred  
34 into a comparable position. However, in doing so, the County

1 Superintendent reached two conclusions of law that are not  
2 supported by statute or other law and, in fact, go not to  
3 whether the positions were comparable but to whether the  
4 Board of Trustees had any information available to assess the  
5 comparability.

6 First, it appears that the County Superintendent  
7 concluded that it is necessary under the statute that a  
8 current updated position description be available prior to  
9 any reassignment occurring in order support any claim that  
10 the new assignment is comparable to the old position.  
11 Second, it appears that the County Superintendent concluded  
12 that a transfer to a position that may be in the process of  
13 "evolving" to a comparable position violates the statute  
14 since the position is still in flux. The State  
15 Superintendent rejects both conclusions to the extent that  
16 they are intended as per se requirements for purposes of the  
17 transfer of a tenured teacher or administrator to a  
18 comparable position.

19 Montana Code Annotated § 20-4-203(1) does not require on  
20 its face that the comparable position to which a teacher is  
21 transferred have an updated position description available at  
22 the time of the transfer occurs which readily demonstrates  
23 that the position is comparable in terms of not only salary  
24 and benefits, but complexity, skill level, responsibility or  
25 other such factors that must be weighed in a particular case  
26 to ascertain whether the transferred teacher will be using a  
27 comparable level of skills, education, and experience in the

1 new position to perform work actually needed by the employer.  
2 Nor is the State Superintendent able to locate any other law  
3 to support such a requirement.

4       It is axiomatic that the duties of the positions itself,  
5 as compared with duties set out in a position description,  
6 would control any determination of whether the position was  
7 comparable to another. The State Superintendent therefore  
8 rejects the County Superintendent's Conclusion of Law No. 8  
9 to the extent that it is intended to impose such a  
10 requirement.

11       Conclusion of Law No. 8 further holds that  
12 Superintendent McMilin's testimony that "the job was evolving  
13 according to his vision" reinforces the fact that the  
14 trustees could not determine comparability. The County  
15 Superintendent then held in Conclusion of Law No. 9 that as a  
16 matter of law the positions were not comparable.

17       To the extent that Conclusion of Law No. 8 purports to  
18 prohibit a school district from transferring a tenured  
19 employee to a position it is in the process of developing  
20 with the good faith intent that such position become  
21 comparable to the prior position within a reasonable  
22 timeframe, that Conclusion of Law is also rejected by the  
23 State Superintendent. Reorganizations do not always, if  
24 ever, occur in a tidy manner that immediately results in  
25 positions that are locked into a static set of duties.

26       Here, it appears that the evidence submitted at hearing  
27 by the Board of Trustees demonstrated the fact that the

1 Trustees had engaged in little to no analysis of the  
2 comparability of the two positions at the time the transfer  
3 occurred. That, however, does not mean that the positions  
4 were not comparable or that such a failure to make the  
5 determination at the time of the transfer should result in a  
6 per se determination that the positions are not comparable.  
7 Again, the nature of the duties in the positions themselves  
8 is determinative of whether the transfer falls within the  
9 requirements of Mont. Code Ann. § 20-4-203(1), irrespective  
10 of the paper trail developed by the Board of Trustees at the  
11 time (though certainly in litigation the paper trail would be  
12 helpful in ascertaining what each position entailed).

13 Here, however, any error by the County Superintendent  
14 with regard to those issues is harmless. The County  
15 Superintendent correctly ordered the appropriate remedy:  
16 That Petitioner be placed in a position comparable to the  
17 position of Laurel High School Principal. The County  
18 Superintendent also provided an appropriate list of factors  
19 to be considered in making the determination of whether the  
20 positions were comparable. However, the County  
21 Superintendent erred in not stopping there. The order to  
22 remand for further fact-finding proceedings before the Board  
23 of Trustees and to then retain jurisdiction to consider the  
24 results of the Board of Trustees' proceedings was in error.

25 **B. Remand to Board of Trustees.**

26 As noted above, when the County Superintendent remanded  
27 the matter to the Board of Trustees, it was for purposes of

1 ordering the Trustees to take specific remedial action.  
2 Specifically, that remedial action was to require the  
3 Trustees to place Petitioner in a "comparable" position to  
4 the position of high school principal. To the extent that  
5 the County Superintendent then required proceedings before  
6 the Board of Trustees and a report from the Trustees  
7 detailing factors that would in effect demonstrate  
8 comparability of the two positions, the County  
9 Superintendent's retention of jurisdiction to consider that  
10 issue was improper. It was one of two things--either a  
11 premature consideration of an appeal the County  
12 Superintendent presumed would be brought by Petitioner to  
13 challenge the Board of Trustees' actions in placing him in a  
14 position it claimed was comparable, or, an improper  
15 delegation of the County Superintendent's fact-finding  
16 function to a party, with regard to whether that party was  
17 complying with the County Superintendent's directive. In  
18 either case, the remand failed to meet due process standards.

19 Both a review of the transcript of that Trustees'  
20 meeting on remand, as well as admissions of the Board's  
21 counsel during oral argument before the State Superintendent,  
22 establish that the proceedings before the Board of Trustees  
23 that were held pursuant to the order of August 22, 2002, did  
24 not comply with the requirements of the Montana  
25 Administrative Procedure Act (MAPA) for contested case  
26 procedures. This is not a situation in which a district  
27 court, acting in an appellate capacity upon judicial review,

1 has remanded the matter to the original hearing examiner to  
2 receive additional evidence. Cf. Mont. Code Ann. § 2-4-703.  
3 Rather, the "remand" was actually a directive to one of the  
4 parties to remedy the alleged violation of Petitioner's  
5 rights and to then make a record that would establish it had  
6 done so. Here, the proceedings before the Board of Trustees  
7 are distinguishable from the situations presented in Phillips  
8 v. Trustees, Madison School Dist. No. 7, 263 Mont. 336, 867  
9 P.2d 1104 (1994) and Johnson v. Board of Trustees, 236 Mont.  
10 532, 771 P.2d 137 (1989), relied upon by the Board of  
11 Trustees here.

12 In Phillips, the school district eliminated a teaching  
13 position based upon financial exigencies. The teacher  
14 alleged he was terminated due to a personality conflict with  
15 his superintendent. In the proceedings before the County  
16 Superintendent, the district was allowed to introduce  
17 evidence regarding subsequent financial problems that had  
18 developed in the district after the termination. The County  
19 Superintendent did not allow the school district trustees to  
20 make the findings on that issue, however. Rather, the  
21 evidence was submitted at hearing before the County  
22 Superintendent. It was simply subsequently developed or  
23 after acquired evidence that came into existence only after  
24 the original decision had been made, which demonstrated that  
25 the school district trustees had correctly projected  
26 budgetary problems that supported the trustees decision to  
27 RIF the teacher.



1        Here, the analogous situation would be for the County  
2 Superintendent to allow evidence to be submitted by the Board  
3 of Trustees regarding how the position of Special Services  
4 Director changed and evolved from the time Petitioner was  
5 transferred to that position until such time as the position  
6 was finalized. At that point, a determination could be made  
7 as to whether or not the positions were comparable.

8        The Johnson case is also not on point. There, a teacher  
9 was suspended pending a hearing on charges that he had  
10 engaged in sexual contact with two female students. A full  
11 disciplinary hearing was held prior to the school board  
12 terminating Johnson for good cause based upon immorality and  
13 unfitness. Johnson appealed to the County Superintendent and  
14 the record of the hearing before the local school board was  
15 admitted. However, that evidence and the findings by the  
16 local school board were not admitted in lieu of the County  
17 Superintendent making findings on whether the local board had  
18 good cause that supported the termination. The evidence at  
19 issue on appeal was whether the videotaped testimony of the  
20 two victims, who were unavailable at the time of the hearing  
21 before the County Superintendent because their families had  
22 both moved out of state, was properly admitted, and whether  
23 the administrative record was properly before the County  
24 Superintendent.

25        The court upheld admission of the evidence where the  
26 teacher was fully represented and present during the hearing  
27 before the local board and had an opportunity to examine

1 witnesses and to cross-examine these witnesses. Finally, the  
2 videotaped testimony and transcripts of the lower proceedings  
3 were duplicative of evidence otherwise admitted at the  
4 hearing before the County Superintendent. They were  
5 therefore properly admitted pursuant to Mont. Code Ann. § 2-  
6 4-612(2).

7       Here, the analogous situation would be if the Board of  
8 Trustees here had conducted contested case proceedings of  
9 some sort prior to making some sort of decision that arguably  
10 adversely impacted the Petitioner. In such a situation, the  
11 record developed before the Board of Trustees would be  
12 admissible before the County Superintendent as a record of  
13 what had transpired and what the Board of Trustees had based  
14 its decision on. However, such proceedings are not required  
15 prior to a school board's decision to transfer a teacher or  
16 administrator to a comparable position.

17       Here, the County Superintendent erred in having the  
18 Board of Trustees itself--one of the parties to the instant  
19 proceedings--preside over proceedings on remand that were  
20 designed to make a record establishing whether or not the  
21 positions were comparable. That evidence was not presented  
22 in contested case proceedings, with each side calling  
23 witnesses, putting on exhibits, and having a right to examine  
24 and cross-examine witnesses. The proceedings on remand  
25 merely constituted a meeting of the Board of Trustees in  
26 which the Board made a decision.

27

1       The remand was improper. The County Superintendent  
2 could properly have entered an order that directed the Board  
3 of Trustees to place Petitioner into a comparable position by  
4 a date certain and retained jurisdiction for a specified time  
5 thereafter to allow Petitioner to seek the opportunity to  
6 present evidence that the new position was, in fact, not  
7 comparable. However, any fact-finding on this issue must be  
8 conducted before the County Superintendent and not before the  
9 Board of Trustees--one of the parties to the instant  
10 proceedings.

11       **C. The Appropriate Remedy.**

12       It is Petitioner's position that if he was not placed in  
13 a comparable position, the notification of teacher re-  
14 election statute, Mont. Code Ann. § 20-4-205, mandates that  
15 the sole appropriate remedy is to re-instate him in the  
16 position of Principal of Laurel High School. He reaches that  
17 conclusion based on his apparent belief that Mont. Code Ann.  
18 § 20-4-203(1) only allows the transfer of a teacher into a  
19 comparable position if notice is given pursuant to § 20-4-  
20 205. That is not the case.

21       Montana Code Annotated § 20-4-203(1) merely defines  
22 tenure by explaining that at the conclusion of a school year,  
23 a teacher with tenure must be elected into the same or a  
24 comparable position as the last-executed contract. It  
25 provides for job security from year to year by requiring  
26 renewal of the employment relation unless the teacher is  
27 terminated for cause or because of a reduction in force due

1 to financial conditions in the school district. However,  
2 that provision does **not** prevent a district from transferring  
3 a tenure employee into a comparable position at **any** time  
4 during the school year. In fact, Petitioner candidly  
5 admitted as much at oral argument, conceding that even if he  
6 was placed back into the position of Laurel High School  
7 Principal, the Board of Trustees could transfer him into a  
8 comparable position the next day.

9 Here, to the extent that Petitioner demonstrated that he  
10 was transferred into a position that was not comparable to  
11 his previous position (or to the extent that the Board of  
12 Trustee's failed to produce sufficient evidence of  
13 comparability at hearing to convince the County  
14 Superintendent that the two positions were, in fact,  
15 comparable), the proper remedy is to order him to be placed  
16 into a comparable position. That is what the County  
17 Superintendent did.

18 **D. The Transfer Did Not Constitute a Termination from**  
19 **Petitioner's Employment Position.**

20 To the extent that Petitioner has also raised the  
21 contention that he was not transferred, but was terminated  
22 from his position (in which he holds a due process property  
23 interest as a tenured teacher), the record does not support  
24 that argument. In Howard v. Conlin Furniture No. 2, Inc.,  
25 272 Mont. 433, 901 P.2d 116 (1995), the Montana Supreme Court  
26 addressed the issue of whether a transfer to a different  
27 position could constitute a discharge. There, a sales

1 manager at a furniture store was informed that he was being  
2 terminated as a store manager. He was then offered a  
3 subordinate position among the sales staff he previously  
4 managed. He was paid over \$50,000 per year as a sales  
5 manager, but would have been paid less than 25 percent of  
6 that amount as a sales staff employee. 272 Mont. at 438, 901  
7 P.2d 119-20. The Montana Supreme Court held that the offer  
8 of the lesser position to Mr. Howard constituted a discharge  
9 from his previous position.

10 That is in sharp contrast to the instant situation where  
11 the employee has maintained his previous salary and benefits.  
12 See also Finstad v. Montana Power Co., 241 Mont. 10, 785 P.2d  
13 1372 (1990). In Finstad, the court held that the termination  
14 of an employee who refused a lateral transfer with retention  
15 of salary and benefits did not constitute an actual discharge  
16 or constructive discharge for purposes of a claim that the  
17 employer had violated the covenant of good faith and fair  
18 dealing.

19 The Montana Supreme Court has held that a public  
20 employee does **not** have a property interest in a particular  
21 position. Wadsworth v. State, 275 Mont. 287, 300-01, 911  
22 P.2d 1165, 1172-73 (1996) (Montana constitution does not,  
23 "without more," grant a right or property interest in any  
24 particular job or employment). Federal courts have also  
25 recognized that where a transferred employee receives the  
26 same wages and benefits as prior to the transfer, he does not  
27 raise a due process claim that he has been "adversely

1 affected." See, Greenberg v. Kmetko, 840 F.2d 467 (7th Cir.  
2 1987) (en banc).

3 In Green, the court noted:

4 This Circuit has expressed a reluctance to find a  
5 transfer to the same pay level to be a violation of  
the Fourteenth Amendment. As this court stated in

6 *Parrett v. City of Connersville*, 737 F.2d 690, 693  
7 (7th Cir. 1984), cert. dismissed, 469 U.S. 1145  
(1985):

8 "In *Lyznicki v. Board of Education*, 707  
9 F.2d 949, 951 (7th Cir. 1983), we  
10 expressed doubt whether a lateral  
11 transfer, involving no loss of pay, could  
12 ever be sufficient deprivation to violate  
13 the Fourteenth Amendment. A contrary  
14 conclusion would subject virtually all  
15 personnel actions by state and local  
governments to potential federal damage  
suits under 42 U.S.C. § 1983--a  
breathtaking expansion in the scope of  
that already far-reaching statute, and  
one remote from the contemplation of its  
framers."

16 840 F.2d at 475. There, the court held that a social  
17 worker's transfer to a unit that substituted "repetitive,  
18 make-work tasks" for the contact with children he had  
19 experienced as a caseworker did not constitute a demotion  
20 where he retained the same salary and his former title as  
21 Social Worker I.

22 A source of an asserted due process property interest in  
23 a particular employment position must **expressly** secure a  
24 claim of entitlement to that position. See Buchanan v.  
25 Little Rock Sch. Dist. of Pulaski County, Arkansas, 84 F.3d  
26 1035 (8th Cir. 1996) (no property interest in position as  
27 principal where statutes preserved right of school board and

1 superintendent to determine assignments for principals);  
2 Ratcliff v. City of Milwaukee, 795 F.2d 612, 624 (7th Cir.  
3 1983); Coe v. Bogart, 519 F.2d 10, 12 (6th Cir. 1975) (where  
4 Tennessee teachers or principals were not entitled to the  
5 specific job to which they were assigned under the Teacher  
6 Tenure Act, action of the school board in transferring the  
7 principal without notice of charges or hearing constituted a  
8 routine transfer of personnel within the school system in the  
9 interest of administrative efficiency that did not amount to  
10 a punitive demotion; action of board did not result in  
11 deprivation of property rights and did not violate the  
12 principal's civil rights).

13       The above cases are applicable here. While Petitioner  
14 certainly has a property interest in being employed by the  
15 school district in the same or a comparable position as his  
16 last-executed contract, there is no requirement that due  
17 process proceeding be provided before such a transfer. The  
18 above cases are in contrast to Sowers v. City of Fort Wayne,  
19 Indiana, 737 F.2d 622, 624 (7th Cir. 1984). There, the  
20 applicable statute expressly provided that fire fighters  
21 would remain in their present ranks "unless and until  
22 demoted" by the Board "in compliance with the terms of the  
23 ordinance," which required notice and a hearing.

24       Disputes over work assignments do not implicate due  
25 process property rights. Maples v. Martin, 858 F.2d 1545,  
26 1550 (11th Cir. 1988) (five tenured university professors had  
27 no property interest in teaching in mechanical engineering

1 department rather than in other engineering departments in  
2 university); Volk v. Coler, 845 F.2d 1422, 1430 (7th Cir.  
3 1988) (plaintiff had no property interest in employment at  
4 particular office of state welfare agency); Ugarvie v.  
5 Jackson, 845 F.2d 647, 651 (6th Cir. 1988) (no property  
6 interest at issue when department head reassigned to regular  
7 teaching duties); Jett v. Dallas Indep. Sch. Dist., 798 F.2d,  
8 748 755 (5th Cir. 1986) cert. granted on other grounds, 488  
9 U.S. 940 (1988) (teacher had no property interest in duties  
10 and responsibilities as coach); Kelleher v. Flawn, 761 F.2d  
11 1079, 1087 (5th Cir. 1985) (assistant instructor had no  
12 entitlement to teach specific courses); Childers v.  
13 Independent Sch. Dist., 676 F.2d 1338, 1341 (10th Cir. 1982)  
14 (tenured teacher had property interest in continued  
15 employment but not in particular assignment).

16 Here, there is no allegation that the Board of Trustees  
17 has forced the Petitioner to resign by changing his working  
18 conditions to a degree that it would be unbearable for a  
19 reasonable person to continue working in the position. See  
20 Clarke v. Eagle Sys., Inc., 279 Mont. 279, 927 P.2d 995  
21 (1996) (no constructive discharge where transferred, demoted  
22 employee did not actually quit and where no showing that new  
23 position resulted in substantial change in salary). Even if  
24 Petitioner had resigned, however, that would not necessarily  
25 establish a due process violation since the decision to  
26 resign must be objectively reasonable. Lewandowski v. Two  
27 River Pub. Sch. Dist., supra, 711 F. Supp. at 1494, citing



1 Jett v. Dallas Indep. Sch. Dist., supra, 798 F.2d at 755 (The  
2 determinative factor is not the employer's intentions, but  
3 the effect of the conditions on a reasonable employee).

4 A plaintiff's subjective beliefs about the desirability  
5 of the new position as compared with the former position do  
6 not control. Kelleher v. Flawn, 761 F.2d 1079, 1086 (5th  
7 Cir. 1985). In Crawford v. ITT Consumer Fin. Corp., 653 F.  
8 Supp. 1184, 1187 (S.D. Ohio 1986), the court restated the  
9 standard for determining whether there had been a  
10 constructive discharge as whether "working conditions are so  
11 difficult or unpleasant that a reasonable person in the  
12 employee's shoes would have felt compelled to resign," citing  
13 Rimedio v. Revelon, Inc., 528 F. Supp. 1380, 1389-90 (S.D.  
14 Ohio 1982). See also Bruhweiler v. University of Tennessee,  
15 859 F.2d 419, 421 (6th Cir. 1988). Cf. Parrett v. City of  
16 Connersville, supra, 737 F.2d 6990 (7th Cir. 1984).

17 The record in the instant proceedings does not support a  
18 finding that Petitioner was terminated from his position. He  
19 was transferred to a position that the Board of Trustees has  
20 contended was comparable. To the extent that the position  
21 was not comparable, however, Petitioner was still not  
22 terminated from his position within the meaning of applicable  
23 law. There is nothing in the record to support a finding  
24 that the new work position is so objectionable that a  
25 reasonable person would find to constitute unbearable working  
26 conditions.

27

1 FINAL ORDER

2 1. The undersigned Hearing Examiner has been appointed  
3 as Acting State Superintendent of Public Instruction and has  
4 jurisdiction over this matter with authority to enter the  
5 State Superintendent's Final Order. Mont. Code Ann. § 20-3-  
6 107(4).

7 2. The County Superintendent properly determined that  
8 the Board of Trustees did not establish at hearing that the  
9 position to which Petitioner was transferred was comparable  
10 to the position of Laurel High School Principal.

11 3. The County Superintendent properly ordered the  
12 Board of Trustees to place Petitioner in a position  
13 comparable to Laurel High School Principal and to evaluate  
14 the comparability based on the factors set out in the County  
15 Superintendent's order of August 22, 2003.

16 4. The County Superintendent improperly remanded the  
17 matter to the Board of Trustees for further fact-finding  
18 proceedings.

19 5. Petitioner was not terminated from his position as  
20 Laurel High School Principal.

21 6. This matter is remanded to the County  
22 Superintendent for further proceedings consistent with this  
23 decision.

24 DATED this 29th day of October, 2003.

25  
26 /s/ Kimberly A. Kradolfer  
27 KIMBERLY A. KRADOLFER  
Acting State Superintendent

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy  
of the foregoing Final Order to be mailed to:

Mr. Rick Bartos  
P.O. Box 1051  
Helena, MT 59624-1051

Mr. David A. Veeder  
P.O. Box 80946  
Billings, MT 59108-9046

DATED: October 29, 2003                      /s/ Kimberly A. Kradolfer

1 c: Cathy Warhank, OPI  
2 Original and one copy here  
3 Fax: Bartos and Veeden  
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